

No. 16226

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

TRI-STATE MUTUAL GRAIN DEALERS FIRE INSURANCE COMPANY,

Appellant,

vs.

C. R. MORRIS, CONSTANCE B. HONAKER, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees,

C. R. MORRIS and CONSTANCE B. HONAKER,

Cross-Appellants,

vs.

THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY,

Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS
C. R. MORRIS and CONSTANCE B. HONAKER

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INTRODUCTORY STATEMENT

C. R. MORRIS and CONSTANCE B. HONAKER, Appellees and Cross-Appellants, as Plaintiffs below, appeal from that portion of the judgment entered in the United States District Court, Southern District of California, Southern Division, in favor of Appellees, THE HOME INSURANCE COMPANY and THE CANADIAN FIRE INSURANCE COMPANY. The status of Plaintiffs, C. R. MORRIS and CONSTANCE B. HONAKER as Appellees and as Cross-Appellants, is factually and

legally the same in both capacities, and as such, their dual position is set forth in this one brief.

JURISDICTIONAL STATEMENT

The Statement of Jurisdictional Facts as set forth in the Opening Brief of Appellant, TRI-STATE, is adopted by Plaintiffs. All parties stipulated in the Amended Pre-Trial Stipulation that the Court had jurisdiction over the subject matter and the parties. (TR. 36).

STATEMENT OF CASE

Plaintiffs, MORRIS and HONAKER, adopt the Statement of the Case as set forth in the Opening Brief of Appellant, TRI-STATE.

SPECIFICATION OF ERRORS

C. R. MORRIS and CONSTANCE B. HONAKER, as Cross-Appellants, specify the following as being errors of the trial court:

1. The Court erred in finding that the policies of insurance executed and delivered by HOME INSURANCE COMPANY and CANADIAN FIRE INSURANCE COMPANY were not in full force and effect at the time of the loss.

2. The Court erred in finding that ROSE GILMORE did not have an insurable interest in the property at the time of the loss.

3. The Court erred in its conclusion that ROSE GILMORE had no insurable interest in the property destroyed.

4. The Court erred in finding and concluding that policies of insurance of HOME INSURANCE COMPANY and CANADIAN FIRE INSURANCE COMPANY were not in force and effect at the time of the fire.

ARGUMENT

PLAINTIFFS, below, C. R. MORRIS and CONSTANCE B. HONAKER, as Appellees, are not faced with the task of opposing the contentions of Appellant, TRI-STATE, in that said Appellant has stipulated in the Amended Pre-Trial Stipulation that its policy was in force and effect as to the interest of Plaintiffs at the time of the fire loss in question (TR. 35). None of the Defendants questioned the fact that Plaintiffs are to be paid for the loss incurred, but the academic question remains as to who shall pay the loss. The prime issue to be resolved by this appeal is to determine whether or not Appellants, HOME and CANADIAN are required to proportionately share with Appellant, TRI-STATE, the loss payable.

As was observed by the trial court, this case was basically a dispute between the respective insurance companies as to their proportionate liability. From a financial viewpoint, Plaintiffs are unconcerned as to whether one insurance company or three insurance companies satisfy the judgment rendered in the trial court.

It has been Plaintiffs initial and present contention that Appellees, CANADIAN and HOME are proportionately liable to Plaintiffs, along with Appellant, TRI-STATE.

To establish the proportionate liability of CANADIAN and HOME, it seems essential to establish that ROSE GILMORE, as a vendee in possession under a pending escrow, had an insurable interest. Appellant TRI-STATE, has endeavored to support, by argument and legal authorities, that ROSE GILMORE did have an insurable interest, however, it appears that Appellant has bypassed a pivotal point which, in Plaintiffs' opinion, influenced the trial court in finding that ROSE GILMORE did not have an insurable interest. The trial court in its Memorandum Opinion stated as follows:

"Section 1662 of the Civil Code cited by TRI-STATE merely provides who has the risk of loss between purchaser and vendor. It does not affect this case . . ." (TR. 42-43). This, we believe, is where the trial court erred, in that as a matter of judicial determination there is no distinction between vendor and vendee relationship under a contract of sale on the one hand, and a vendor and vendee relationship under a pending escrow agreement, on the other. In either instance, if the vendee is *in possession*, the risk of loss falls upon the vendee. An escrow agreement is nothing more or less than a Contract of Sale, is specifically enforceable by either party, and has all of the legal characteristics and accompanying rights of what is commonly known as a Contract or Agreement of Sale.

In BROWN V. ROBERTS 121 CA 654; 9 P 2d 517, the Court in interpreting the legal effect of escrow instructions, held as follows: "That escrow instructions may be sufficient to constitute an agreement between the parties is well settled (cases cited). In the escrow instructions in this case, we find all of the necessary elements to constitute a valid agreement set forth with sufficient certainty to entitle the parties to specific performance."

It is evident that a sale of real property, whether negotiated under the label of an Agreement or Contract of Sale, or as an Escrow Agreement, is nonetheless, one and the same thing.

ROSE GILMORE, as a vendee in possession under a pending Escrow Agreement was possessed with exact rights and liabilities that she would have possessed had she been a vendee in possession under a document which would have been entitled "Agreement or Contract of Sale." Under Section 1662 of the California Civil Code, the risk of loss accompanied her possession of the premises. Having the risk of loss, ROSE GILMORE had an insurable interest. Having an insurable interest, the policies of HOME and CANADIAN covered such insurable

interest. Plaintiffs as named beneficiaries under the mortgagee clauses contained in the HOME and CANADIAN policies are entitled to judgment against CANADIAN and HOME, along with TRI-STATE, to the extent of the respective and proportionate policy limits.

Respectfully submitted,

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